UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 30, 2008

CBCA 44, 45, 46, 576

INNOVATIVE (PBX) TELEPHONE SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

David W. Young, Vice President of Innovative (PBX) Telephone Services, Inc., El Paso, TX, appearing for Appellant.

Brian Reed and Phillipa Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **WALTERS**.

SHERIDAN, Board Judge.

These appeals arise out of disputes between the appellant, Innovative (PBX) Telephone Services, Inc. (IPS), and the respondent, the Department of Veterans Affairs (VA), in contract V692C-410 to upgrade the telephone system at the VA Domiciliary (VADOM)[1] in White City, Oregon.[2] IPS seeks $6,524,539 in damages for breach of contract

[1] VA domiciliaries provide bed-based care in safe, secure, semi-structured, homelike facilities, with the goal of helping veterans function independently. Veterans living in VA domiciliaries do not need the skilled nursing services provided at VA hospitals and nursing

based on bad faith and racial animus, lost profits from direct sales, and lost anticipatory profits from future contracts.

In CBCA 44, IPS alleges that the VA acted in bad faith when it failed to timely pay outstanding invoices and failed to exercise the nine option years associated with the contract. In CBCA 45, IPS seeks a total of $1,021,015 in lost profits based on the VA's alleged breach of the contract ($430,801 in lost profits from equipment purchases that IPS asserts should have been made during the base requirements period of the contract and $590,214 in lost profits from equipment purchases that the appellant maintains should have been made during the nine option periods). The appellant argues in CBCA 46 that the VA deprived IPS of $1,632,590 in profits it should have made from the maintenance services it would have provided had the VA exercised all the option years. Finally, CBCA 576 is a claim in which IPS seeks the profits it says it would have earned from additional contracts it might have been awarded during the contract and its nine option years, but for the bad faith of the contacting officer and contracting officer's technical representative (COTR). In CBCA 576, IPS asserts it would have realized $4,621,541 in profits from direct sales and equipment purchases, and $718,391 in profits from maintenance services, on contracts it might have been awarded at other VA installations, but lost because of the bad faith and racial animus of the VADOM officials.

The record before the Board consists of the pleadings; the appeal file, exhibits 1 through 153, and the appeal file supplement, exhibits 500 through 559 (with exhibits 510 and 530 blank); Board exhibits 1 and 2; and the two-volume transcript of the hearing in this matter.[3] We also considered in writing this decision the appellant's main brief (appellant's

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home facilities, and are capable of daily self-care activities. *See* www1.va.gov/domiciliary. The VADOM is now referred to as the Southern Oregon Rehabilitation Center and Clinics.

[2] Hereinafter referred to as the "contract" or "telephone system upgrade contract." The contract and record refer to the "base requirements period of the contract." During part of this period the telephone system upgrade was being installed and tested, and the parties referred to this portion of the contract as the "installation" or "construction" contract (or period). Once the upgraded telephone system was accepted, the contract then required that the system be warranted and maintained for one year. At times, the parties referred to this portion of the contract as the "maintenance" contract (or period).

[3] Board Exhibit 1 consists of the uncontroverted facts contained in the joint comprehensive statement of facts submitted by the parties and entered into the record during the hearing. Board Exhibit 2 is a list containing a breakdown for the settlement reached on August 4, 2006, in an alternative dispute resolution (ADR) proceeding between the VA and

brief), the respondent's reply brief (respondent's reply), and the appellant's rebuttal brief (appellant's rebuttal).

We deny all the appeals because the appellant has failed to meet its burden of proving the contracting officer acted in bad faith during the administration of the contract and in deciding not to exercise the option period. We see no convincing or compelling evidence that any VA official acted in an arbitrary or capricious manner, or with bad faith, during this contract or the site prep contract referenced *infra* at pages 6-7.

Statement of Facts

On February 20, 1997, solicitation 692-17-97 was issued pursuant to section 8(a) of the Small Business Act[4] seeking proposals to upgrade the existing Nortel Meridian SL1 Option telephone system at the VADOM. Appeal File, Exhibit 2. The solicitation noted that the VA anticipated that the request for proposals (RFP) would result in an "indefinite quantity/indefinite (IDIQ) delivery contract" of "commercial products." *Id.* at A-2. The RFP provided that during the base requirements period of the contract, certain equipment needed to upgrade the telephone system would be purchased by the VA, and be furnished, installed, maintained, and warranted by the contractor for one year following the installation. The RFP also provided for nine option periods during which the upgraded system was to be maintained by the contractor, and additional equipment was to be purchased by the VA, with the contractor responsible for furnishing, installing, and warranting the additional equipment. *Id*., Exhibit 2. The RFP provided:

> E.2.4 TERM OF THE CONTRACT
> The term of this contract is 120 months from date of award and consists of a base period and nine (9) one year options.
>
> E.2.4.1 OPTION TO EXTEND THE TERM - BASIC CONTRACT PERIOD
> If less than 60 days exists between award and the end of the basic contract period, the award shall be construed as to imply sufficient intent to exercise the first option to extend the term.
>
> E.2.4.2 OPTION TO EXTEND THE TERM OF THE CONTRACT (APR 1984 FIRMR)

IPS regarding several other appeals arising from the contract (docketed at the VA Board of Contract Appeals (VA Board)).

[4] 15 U.S.C. § 637(a) (1994).

> This contact is renewable at the prices stated elsewhere in the contract, at the option of the Government, by the contracting officer giving written notice of renewal to the contractor by the first day of each fiscal year of the government or within 30 days after funds for that fiscal year become available, whichever date is the later; provided that the contracting officer shall have given preliminary notice of the Government's intention to renew at least 30 days before this contract is to expire. Such a preliminary notice of intent to renew shall not be deemed to commit the Government to renewals. If the Government exercises this option for renewal, the contract as renewed shall be deemed to include this option provision. However, the total duration of this contract, including the exercise of any options under this clause shall not exceed 120 months.

Id. at E-3.

Proposals were received and evaluated by the VA, with IPS submitting its best and final proposal on July 28, 1997. Appeal File, Exhibit 7. On August 14, 1997, via letters to the Small Business Administration (SBA) and IPS, the VA notified each that it had accepted IPS' final proposal and had awarded contract V692C-410, with IPS designated as the 8(a) subcontractor.[5] *Id*., Exhibits 8-10. The VA contracting officer, Ms. Katherine Baughman, signed the contract indicating that the award was in the amount of $3,441,273 "for the base requirement plus ten years maintenance (if the Government exercises the optional maintenance)." She wrote that $2,000,906 of that amount was for the base requirement. *Id*., Exhibit 8. Mr. Jose Arreola signed the contract as SBA's contracting officer and small business assistance manager, and Mr. Donald Young signed as the president of IPS. *Id*., Exhibit 12; Transcript at 66.[6]

During the base requirements period of the contract, IPS was required to furnish and install the equipment needed to upgrade the telephone system in accordance with the contract. It was also required to warrant and maintain the system upgrade for one year after the installation was accepted. The VA was to pay for the equipment needed to perform the

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[5] The contract includes the specifications set forth in the RFP and the equipment and price schedules submitted in IPS' July 28, 1997, best and final offer. Appeal File, Exhibits 2, 6.

[6] Messrs. Donald Young and David Young both participated for IPS in the performance and administration of the contract. Both are referred to in this decision by their first and surnames to obviate confusion. Mr. David Young is the vice-president of IPS and also represented it before the Board in these appeals.

upgrade based on the prices set forth in schedules contained in the contract. During the RFP process, the VA and IPS had agreed on various pieces of equipment and the quantities that were needed for the upgrade, as well as the prices and labor associated with each piece of equipment that was installed in the system upgrade. The quantities, purchase prices, labor (installation) prices, and basic monthly maintenance prices for every item were set forth by item description and contract line item number (CLIN) in the schedules that were included in the contract. Appeal File, Exhibit 6 at 1.[7]

The contract also included reference to nine option years which the VA could exercise. A separate schedule was included in the contract containing the prices for the option years. Appeal File, Exhibit 10. The approximate value of the contract, including the nine option years, was $3,441.273.90. *Id*., Exhibit 11. The Standard Form 1449 executed by the parties states that the contractor would "Upgrade Current Nortel Meridian SL1 Option Telephone System Processors/Line Cards to Option 81C per solicitation terms and conditions," for a unit price and award amount of $3,441,273.90, "(IF GOVERNMENT EXERCISES ALL OPTIONAL MAINTENANCE YEARS)." *Id*., Exhibit 12; Transcript at 178, 545.

Bonds were required for the base requirements period (what the parties also referred to as the construction period of the contract). A pre-construction meeting was held on September 26, 1997. Appeal File, Exhibit 13. At the pre-construction meeting the VA gave IPS an orientation to the facility and addressed, among other things, the contract's general requirements, the work areas, and use of the parking areas and restroom facilities. Transcript at 332-33, 418. Among the individuals attending the meeting for the VA were Ms. Baughman and the Chief of the VADOM's Information Management Service (IMS), Mr. Ray Sullivan, who was also designated as the COTR for the contract. Mr. Donald Young and IPS' job site supervisor, Mr. Carl Holst, represented IPS at the meeting. Appeal File, Exhibit 13 at 2. The contract called for Completion within 120 calendar days, so January 28, 1998, was established as the date for the switch-over from the old telephone system to the upgraded system. Transcript at 284.

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[7] The schedules are tables listing information. Table B-1 is the schedule setting forth the equipment and software units needed for the base requirements period. Table B-2 is the schedule setting forth information for system training. Table B-3 is the schedule setting forth system moves, adds, changes (MACs), and growth/follow-on units. Table B-4 is the system life pricing summary by month. Table B-5 is the system life pricing summary by year. Appeal File, Exhibit 6.

The VA was responsible for ensuring that the site was properly prepared to receive the upgraded telephone system. It approached IPS to perform the site preparation work. On December 10, 1997, the VA issued purchase order V692P-1926 to IPS, whereby IPS started to prepare the site for the upgraded telephone system by providing the materials and labor to perform core drillings and to install conduit sleeves at eighty-nine locations.[8] Appeal File, Exhibit 16. When additional conduit runs were needed, the VA asked IPS to submit a proposal for that work, which it provided on January 22, 1998. *Id*., Exhibit 22. Having questions about IPS' proposed hourly rate, on February 3, 1998, the contracting officer issued a unilateral change order requiring IPS to run additional conduit. In its proposal, IPS contended that this additional work would cost $9123. Instead of negotiating a bilateral modification for the change, the VA requested IPS to furnish back-up documentation from its supplier on its proposed pricing. *Id*.

The base requirements period and the site work contracts appear to have progressed evenly until approximately mid-January 1998. On January 21, 1998, the contracting officer wrote to IPS noting her concern that several items had not been submitted as required by the contract that were critical to a timely cut-over from the old telephone system to the upgraded telephone system. She indicated that a new cut-over date would need to be established but that certain critical items needed to be completed prior to establishing the new cut-over date. Appeal File, Exhibit 20. On January 23, 1998, the contracting officer issued a cure notice on the items listed in her January 21 letter, citing several contract requirements that had not been completed by IPS. *Id.*, Exhibit 21.

IPS wrote the VA on February 3, 1998, that in order for IPS to submit a correct time line and an estimated cut-over date the VA needed to provide a dedicated power source in the switch room. IPS wanted to know when the VA would complete that necessary work. Appeal File, Exhibit 23. The VA wrote back on February 9, 1998, that it was "currently installing the power feed in the switch room." *Id*.

IPS responded to the cure notice on February 5, 1998, addressing some, but not all, of the cure notice items, i.e., only those items IPS characterized as the "requirements needing immediate attention." Appeal File, Exhibit 21. In some instances, IPS provided a standard response: "As stated above, IPS has made it a practice to coordinate with the COTR and alternate COTR on all installations performed at the VADOM. However, to insure that all information is communicated properly, we will be recording the minutes of all meetings and have the COTR and our representative sign the document." *Id*. On February 6, 1998, the VA

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[8] This purchase order is hereinafter referred to as the "site work" or "site-prep" contract.

wrote IPS seeking "further clarification" from IPS, including a detailed project milestone chart and certain payroll records. The contracting officer noted that, based on a review of the payroll records, it appeared to her that there were some Davis Bacon Act labor requirements issues concerning the contract, particularly underpayment of certain subcontractor employees. *Id*. On February 18, 1998, with assistance from the COTR, the contracting officer also sent a letter countering, point-by-point, IPS' February 5 response to the cure notice, noting that several items were critical and that IPS should submit explanations for the outstanding items that it failed to address in its original response. *Id.*, Exhibit 20.

Relations continued to deteriorate, with IPS blaming the VA for not having the site prepared for the installation of the upgraded telephone system and the VA blaming IPS for delays due to lack of paperwork, failures to communicate, and other performance related issues. Meetings were scheduled and rescheduled, with the parties administering the contract by trading letters, accusations, and cryptic responses back and forth. Appeal File, Exhibits 24-29. Another show cause notice was issued to IPS on February 28, 1998. *Id.*, Exhibit 29. Citing the letters of January 23 and February 18, 1998, and noting IPS' failure to cure the conditions described in those letters, the contracting officer wrote that IPS was "endangering performance" and that she was "considering terminating the contract . . . [for] default." *Id*. She gave IPS ten days to present, in writing, any facts it wished to have considered bearing on her decision of whether to default. *Id*. On March 3, 1998, IPS sent the VA a letter containing what was essentially a resubmission of its response to the cure notice of January 23, 1998. *Id*. The following day, on March 4, 1998, IPS sent a second letter responding to the show cause notice, which, in part, pointed out that IPS had addressed certain deficiencies in its "second response to the cure notice" and took exception to the portions of the cure notice pertaining to "documentation and paperwork" because it believed that the performance issues under the contract pertained only to "the work of installation" of the system. *Id*. On March 9, 1998, IPS again expressed the view that the VA had caused the delay of the system installation because the site was not prepared in a timely fashion for installation of the telephone system upgrade. IPS requested a thirty-five day time extension. *Id*.

The strained relationship continued to worsen throughout March and April 1998, with the contracting officer pursuing the Davis Bacon Act labor issues. Appeal File, Exhibit 33. Additionally, the VA sent several letters in March 1998 that posed questions to IPS on ongoing contract performance issues. Appeal File, Exhibits 32, 35, 37. IPS continued to respond to the inquiries. *Id.*, Exhibits 34, 36. On April 3, 1998, IPS wrote to the contracting officer again requesting an extension of the cut-over, this time to June 12 through 14, 1998. *Id.*, Exhibit 38. Citing its goal to be technically compliant prior to an inspection on April 13, IPS wrote the VA on April 8, 1998, maintaining that in order for it to be compliant, the VA would need to provide the "system power ground" work that the VA was required to perform.

Id., Exhibit 42. The VA wrote back on April 9 that it had already given IPS power and that IPS needed to provide the VA with test results and manufacturer's information in order for the VA to determine "whether the power source already provided meets the manufacturer's requirements." *Id*. IPS wrote back the same day, clarifying what it needed. *Id*. On April 10, 1998, IPS sent to the VA its pre-cut-over plan and updated milestone chart for the telephone system upgrade contract indicating that it planned to have everything operational by June 14, 1998. *Id*.

Mr. Matthew Hammaker, a telecommunications specialist from the VA's Telecommunications Support Service, came from Washington, D.C., as a technical advisor for the contract, and on April 13 through 17, 1998, performed a contract compliance inspection and began a pre-cut-over inspection of the telephone system upgrade. Appeal File, Exhibit 151. Mr. Hammaker recommended that the cut-over date be confirmed. *Id*. The VA issued a 163-day time extension on April 20, 1998, and established a new completion date for the contract, July 12, 1998. *Id.*, Exhibit 43. As consideration for the time extension, the VA obtained, at no cost to the Government, additional monthly maintenance on the telephone system during the extended period and removal of some old equipment, as well as some changes to the cabling. *Id*.

Ms. Baughman wrote IPS on May 15, 1998, about her investigation and conclusions on the labor issues associated with the contract, informing IPS that she had determined that two of IPS' subcontractors had wage classification deficiencies for which its employees should be compensated. Appeal File, Exhibit 50. On May 21, 1998, Ms. Baughman sent IPS a list of items informing it that the COTR "had done a walk thru of this project to check on the actual status of items to be done prior to cut-over, and to get a list of items needed to be completed [by IPS]." *Id.*, Exhibit 51.

Mr. Hammaker returned to the VADOM on June 11 through 16, 1998, to conduct final inspection, test evaluation, and cut-over acceptance of the upgraded telephone system. Appeal File, Exhibit 152. As reflected in a memorandum of understanding (MOU) dated June 15, 1998, the test and cut-over of the system began on June 12, 1998. *Id.*, Exhibits 59, 545. On or about June 15, 1998, the "system installation was found to be technically acceptable except for [twenty-two] items noted [in the MOU]. The items identified must be accomplished in order for the system to be found fully acceptable." *Id.*, Exhibits 59, 545. The twenty-two items listed were to be completed by July 17, 1998. *Id*. Final acceptance would not occur until all the MOU requirements were satisfied and the telephone system was able to function without major interruption for thirty days after cut-over. *Id.*, Exhibits 59, 545.

On June 26, 1998, the contracting officer contacted IPS, maintaining that she had not yet received technical information on the fire-stopping material that IPS had proposed using and was in the process of installing. She informed IPS that the VA's Regional Safety Office was requesting this information, which was supposed to have been provided prior to its installation.[9] Appeal File, Exhibit 60. That same day, the contracting officer advised IPS that the intrusion alarms were not working in several critical areas of the VADOM, including the canteen office, kitchen, retail store, and storage room, as well as the pharmacy, narcotics room, and agent cashier areas. Evidently, the alarms were working prior to the cut-over, but had stopped working after the cut-over. She informed IPS that the VA would have to initiate extra security measures until the intrusion alarm problem was resolved. *Id.*, Exhibit 61.

During July 1998, the parties continued to work through several outstanding issues. On July 21, 1998, IPS notified the contracting officer that it had not yet received from the VA an electronic version of the as-built drawings for the old telephone system, and that it needed those drawings to update them per the MOU. Appeal File, Exhibit 72. IPS indicated that it would take "several weeks" to update the drawings. *Id.* On July 23, 1998, the contracting officer provided IPS with an electronic version of the old system's as-built drawings, but asserted that the COTR and the alternate COTR had each already provided those drawings to IPS, as IPS was supposed to have used the drawings to develop and provide the cable distribution system. *Id.* On July 30, 1998, Ms. Baughman wrote IPS that a physical count of the speakers and speaker horns installed by IPS had been performed, and she questioned whether the VA had been provided with too many of one type of speaker and not enough of another type. *Id.*, Exhibit 74. She indicated that IPS should conduct a count during an upcoming inspection. *Id.* Ms. Baughman wrote IPS on July 31, 1998, that there were still seven items remaining open and uncompleted from the MOU, and that the telephone system could not be considered fully acceptable until all items were completed. *Id.*, Exhibit 75. She also told IPS that the overstocked inventory items remaining in the VA warehouse needed to be removed. *Id.*

Regarding the contractually required maintenance of the upgraded telephone system, IPS informed the contracting officer on July 31, 1998, that:

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[9] IPS replied on June 29, 1998, that the only fire-stopping material being used on the project was the material that it had proposed. Appeal File, Exhibit 62. Responding on June 30, 1998, the VA wrote that it needed immediate attention to this item, noting that it considered the fire-stopping material to be a "significant safety issue," and that the material would not be approved for the project until previously requested literature was received and reviewed. IPS provided the requested information to the contracting officer on the next day, July 1, 1998. *Id.*

> We are in [the] final stages of contract negotiations with Sprint United (Sprint) to maintain the . . . telephone system at the VADOM. Specific details regarding this arrangement will be sent as soon as possible. This new arrangement does not affect the procedures submitted to the VADOM for trouble shooting. We will still continue to have a certified technician, Mr. Derek Cambridge, on site the week of August 3, 1998, to respond to any reported troubles.

Appeal File, Exhibit 76.

VA and IPS personnel performed a walk-through of the project site on July 30 and 31, 1998, to identify any items on the MOU still needing corrective action. Appeal File, Exhibit 77. The results of the walk-through were memorialized by the VA in a letter dated August 24, 1998, which now listed thirty-one items still needing corrective action. *Id*. IPS was asked to notify the VADOM's Facilities Management Service (FMS) as soon as each item was corrected so that the item could be reinspected. *Id*. The contracting officer also asked IPS to contact the FMS once the fire-stopping material was installed in each area so that arrangements could be made for a VA fireman to inspect the installation for acceptance. *Id*. IPS responded by letter dated August 28, 1998, complaining that three inspections had been performed and the VA continued to identify new items as incomplete in each subsequent walk-through. IPS asserted that the identification of new items in each walk-through was delaying its completion of the project, and that its requests for reinspection were being left unanswered by the VA. *Id*.[10]

Ms. Baughman wrote IPS on September 2, 1998, contending that there was a discrepancy between the number of speakers and speaker horns reported, based on her own inspection of the speakers and horns installed by IPS. Appeal File, Exhibit 78. She provided a list describing the location of each speaker and horn she found installed and advised IPS that:

> the total count for speakers installed amounts to 606, and the total count for horns amounts to 176. The contract documents show the speaker total should have been 832, with the horn total of 120. The adjustment in quantities will be made by a modification to your contract in accordance with your B-1 table.

Id.

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[10] Pursuant to the base period requirements contract, once acceptance occurred, IPS would then have to warrant the upgraded telephone system for one year.

The contracting officer received a memorandum from the chief of the VADOM's FMS on September 4, 1998, listing several problems that had been encountered during a reinspection of the upgraded telephone system. Appeal File, Exhibit 77. The memorandum indicated that the referenced problems created "a life safety hazard for patients, staff, and visitors, and that the conditions needed to be corrected immediately." *Id*. On September 15 and 22, 1998, IPS requested reinspection of the remaining outstanding items, and the upgraded telephone system was accepted on September 24, 1998. *Id*., Exhibit 148; Transcript at 304-05, 442, 448-500. Acceptance of the upgraded telephone system signified the beginning of the one-year warranty period. Transcript at 304-05.

During the warranty period, IPS continued to have problems. Ms. Baughman contacted IPS on October 16, 1998, alleging a latent defect, because the system connecting the paging system with the telephone system was not working. She believed this was a "critical life safety" issue, because the systems were used for notification of fires, as well as medical emergencies and other emergencies. Transcript at 438, 505-02. IPS wrote back on October 21, 1998, that it would correct the problem. Appeal File, Exhibit 82.

On November 18, 1998, the contracting officer issued a cure notice to IPS regarding the response time for maintenance and follow-on services required under the language contained in contract paragraph B.1.4.10:

> IPS shall certify that a repairman will be on premises and initiate trouble shooting and repair within 24 hours after receipt of a routine maintenance call. After receipt of an emergency maintenance call, [IPS] shall certify that a repairman will be on premises within two (2) hours (24 hours per day) and have initiate[d] trouble shooting and repair. Routine follow-on service must be provided within 72 hours of receipt of request. Emergency follow-on services shall be provided within 24 hours of receipt of request.

Appeal File, Exhibit 82. Evidently, an incident occurred in which a problem had been called in on November 5 but had not been corrected as of November 18, the date of the cure notice. *Id*. Ms. Baughman noted that this type of incident involving response times for maintenance and service calls had occurred before, and informed IPS that its failure to respond as required by the contract was a condition that was endangering the performance of the contract. *Id*. She gave IPS ten days to cure the condition and threatened default if it was not cured. *Id*. In closing the letter, she also declared:

> As the contracting officer has been told by your firm that you have a contract with Sprint for the follow-on service and warranty work, request is made for a letter from Sprint confirming that they are in fact under a contract with your

> firm to provide the services required and an explanation as to why the service has not yet been provided on our work order from November 5, 1998. As the prime contractor, you are ultimately responsible for your subcontractors.

Id.

During that same period of time, Ms. Baughman continued to review the pieces of equipment provided by IPS and made a list of equipment "needing adjusting." She approached IPS on November 18, 1998, with a proposed modification to decrease the contract amount by $99,027 for equipment she believed that the VA had not received. Appeal File, Exhibit 89. IPS wrote back on November 25, 1998, that it would not agree to the proposed modification and that it believed that the proposed modification was the VA's attempt to avoid paying shipping and restocking fees owed to IPS. Appeal File, Exhibit 93. Ms. Baughman responded to IPS the same day denying that she was attempting to avoid paying shipping and restocking fees, but, she wrote, before those fees could be paid by the VA she needed back-up documentation. She insisted that the modification addressed a different issue: items for which the VA was billed, but had not received. She wrote: "Because of discrepancies found in quantities, our facility has requested further assistance . . . to go over this contract." *Id*.

Ms. Baughman wrote another letter to IPS on November 25, 1998, seeking an additional decrease of $33,790 to the contract for certain equipment that she believed IPS had billed for but not installed. Appeal File, Exhibit 94. Ms. Baughman found what she considered to be other discrepancies with the equipment and how IPS was staffing the contract and continued to contact IPS regarding the discrepancies. *Id*., Exhibits 95, 96.

Mr. George Andries, the director of the VADOM, wrote the VA's Communications Support Office in Washington, D.C., asking it to provide a technical support site visit and post-contract audit, representing that: Our contracting officer has reason to believe [IPS] has grossly over-billed this project and follow-on services remain in question." Appeal File, Exhibit 556. Mr. Arreola was forwarded a copy of the letter on January 11, 1999. *Id*., Exhibit 557.

On November 25, 1998, IPS' vice-president, Mr. David Young, wrote the VA, stating: "Enclosed is a letter from Sprint confirming our contract with them to provide maintenance and follow-on service for the VADOM." Appeal File, Exhibit 97. Concerning the VA's November 18 cure notice regarding certain work orders that had not been completed in a timely fashion, Mr. Young wrote:

> Concerning the number of work orders IPS has received and completed expeditiously, which number over 30, IPS feels that this cure notice is pure harassment. IPS has striven and continues to provide the VADOM White City with the best possible service, in many cases at IPS' expense. IPS [believes] that you, as a contracting officer, have a personal vendetta against IPS. We, at IPS, would like to know why.

Id. Ms. Baughman wrote back on November 27, 1998, informing IPS that its November 25 letter did not enclose the confirmatory letter from Sprint, and asking it to send her a copy of that letter. She revealed that she had received information that IPS did not have a signed contract with Sprint, only a letter of intent.[11] She denied having a personal vendetta against IPS and asserted: "[This] contract has not been handled any differently than any other contracts at our facility. It is the contracting officer's responsibility to make sure that the contract terms and conditions are followed, and the Government is getting what it has contracted and paid for." *Id*.

Problems continued with the upgraded telephone system and with IPS' responses to those problems. In a letter of November 20, 1998, Ms. Baughman noted that she had left a voice message with IPS about an apparent problem concerning IPS and its purported subcontractor, Sprint. She revealed that Sprint personnel had walked off the job stating they had no contract with IPS, and that she was very concerned about who was providing maintenance and follow-on services. She listed various contractual requirements and asked IPS to provide her, in writing, the arrangements that it had made to provide the contractually required services. Appeal File, Exhibit 90.

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[11] The record contains a letter addressed to IPS dated July 31, 1998, from Sprint's General Manager Business Markets, Mr. Glen Pearce, writing:

> Please accept this letter as Sprint's commitment to provide a time and materials maintenance contract to Innovative PBX Services. This contract will be limited to the Department of Veterans Affairs, White City, OR. Sprint will charge $65.00 per hour for labor for both service and MAC [moves, adds, changes] add-on activity at that site . . . . Sprint will bill IPS for all services performed at IPS's request. Sprint is prepared to begin the work on Monday, August 3, 1998, and continue under this arrangement until August 2, 1999. Any additional details required will be discussed and communicated between Sprint and IPS no later than August 15, 1998.

Appeal File, Exhibit 97.

On November 30, 1998, Ms. Baughman wrote IPS that certain work the VA had ordered on November 5, which IPS claimed had been completed, was still outstanding. She complained that IPS personnel had stated a number of times that they would be back to complete the work, and that the COTR had canceled vacation based on those promises, but no one returned from IPS to complete the work order which was almost one month old. Appeal File, Exhibit 98. IPS responded the next day, contending that Ms. Baughman was "misinformed" and her statement that the work remained unperformed was incorrect. IPS had verified that its technicians were at the VADOM on November 25, but had been unable to locate the COTR. Mr. David Young went on to contend that some of the work ordered could not be completed because conduit and pathway work that was the responsibility of the VADOM was not in place. He wrote that "IPS has notified the IMS [Information Management Service] department (Mr. Dennis Vollrath) that [the] VA Engineering [Service] needs to handle these items before any further work can be done. Therefore, IPS has completed [the] work order [in issue] . . . as stated in our letter dated November 19, 1998." *Id*.

Ms. Baughman wrote Mr. Arreola (SBA's representative on the contract) on December 17, 1998, asking him to come with IPS to the VADOM for a site visit and a meeting to go over outstanding issues including payments, supplemental agreements, and payroll issues. Appeal File, Exhibit 100.

On Tuesday, December 29, 1998, the VADOM experienced a serious telephone problem. All incoming calls to the facility were receiving a busy signal. A trouble call was made to IPS at 8:25 a.m. that morning, and Mr. Donald Young was then contacted at 9:30 a.m. because the VA had received no response to the earlier call. Upon being contacted, Mr. Donald Young maintained that IPS had contacted Sprint and that someone from Sprint would arrive at the VADOM within the hour to perform the emergency repair. Appeal File, Exhibit 101. The VADOM contacted Sprint and was told that Sprint would not be coming to the VADOM to fix the problem because it did not have a contract with IPS. At 10:00 a.m. the COTR, who was on vacation, arrived at the VADOM to see whether he could assist with the fix because it had placed the facility at a very high risk. While the problem existed, no one calling from outside the facility could reach individuals inside the facility. The VADOM relied heavily on physicians from outside the VADOM being able to call into the facility. *Id*. The COTR contacted IPS and informed it that all forty-eight direct inward dialing (DID) lines were disabled. He discussed whether he should attempt to enable the DID lines given the urgency of the situation and the absence of IPS and Sprint support. A decision was made that the COTR would proceed to enable the DID lines. *Id*.; Transcript at 443, 472. Ms. Baughman also attempted to contact Sprint and was told that a contract had not yet been signed and was still being reviewed by Sprint's attorneys. Mr. Pearce from Sprint told her that Sprint's current agreement with IPS only provided for service coverage from 5:00 p.m.

on Fridays through 8:00 a.m. on Mondays, and that, therefore, IPS, not Sprint, should be providing the service. Ms. Baughman explained the exigency of the situation and Mr. Pierce said that he would check into it; however, she was subsequently informed that no one from Sprint would be dispatched to the VADOM because the emergency was not occurring within the time frame of its agreement with IPS. *Id*., Exhibit 101. Ms. Baughman was later informed that "Pete," from IPS, was on his way to the facility. Mr. Pete Cambridge arrived the following day at 1:30 p.m. *Id*., File, Exhibit 101.

The contracting officer issued a show cause notice to IPS on January 6, 1999, raising the December 29 emergency situation, and noting that IPS' failure to provide proper coverage as required by the contract was endangering performance, that she had warned IPS previously about this issue, and that she was considering terminating IPS' contract for default. Appeal File, Exhibit 101. Mr. David Young responded on January 14, 1999, "IPS regards your letter as one of harassment and written without justice." *Id*. He blamed the problem on a power failure at the VADOM and Sprint's inability or refusal to perform "a simple task" to re-enable the DID lines. *Id*. As an excuse for not providing coverage during the emergency, IPS indicated that it regarded the entire week of December 29 to be a holiday, assumed that Sprint did also, and, therefore, expected Sprint to respond to emergency calls for that week. To prevent a recurrence, IPS assured that it had "merged" its holiday schedule with Sprint's. IPS indicated that it never agreed to have a person on-site during the week, but it offered to employ a technician permanently located in the area so that IPS could respond to emergencies within contractual parameters, and that Sprint would continue to provide coverage on weekends. Mr. David Young acknowledged that IPS still had not entered into a "detailed contract" with Sprint, but reiterated that it had an agreement with Sprint requiring Sprint to provide service on weekends. *Id*. The contracting officer responded that the issues could be discussed in person at the meeting scheduled for January 27, 1999, and with Mr. Arreola present from the SBA. *Id*.

On January 18, 1999, Mr. David Young wrote Ms. Baughman, presumably to address her concern about IPS' emergency coverage. Appeal File, Exhibit 105. He wrote that IPS had received and accepted a letter from Sprint committing Sprint "to provide a time and materials maintenance contract" for the period of August 3, 1998, to August 15, 1999. *Id*. He insisted that the letter was a "commitment" from Sprint to provide the maintenance for the VADOM, and that a detailed version of the letter was being finalized in time for the January 27 meeting between personnel from IPS, SBA, and the VADOM. *Id*.

Ms. Baughman wrote to IPS on January 20, 1999, asking that the "normal system traffic data" be provided to the COTR as required by paragraph B.1.2.11 of the contract. Appeal File, Exhibit 109. She also asked IPS to provide the "traffic study" as required by contract paragraphs B.1.2.4.10 through B.1.2.5.2, noting that these reports, which per the

contract were required to be submitted on a quarterly basis, were late. *Id*. The traffic reports were provided on January 28, 1999. *Id*.

Mr. Hammaker of the VA's Telecommunications Support Service, returned to the VADOM on January 25 through 29, 1999, to perform a contract compliance audit and to attend meetings on the contract. His field trip report for that period noted several problems.[12] Appeal File, Exhibit 153. It was Mr. Hammaker's technical opinion that since the system had been cut-over in June 1998, IPS had not met the terms of the contract for maintenance and follow-on services. He considered "the VADOM at great risk for loss or degradation of

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[12] In pertinent part, Mr. Hammaker noted:

> **Audit Item:** Contract sections for maintenance and follow-on services B.1.4.6 through B.1.4.17 were reviewed to determine compliance with maintenance response times and levels of service . . . .
>
> **Technical conclusion:** The telephone contractor is not responding to emergency, routine maintenance or follow-on service (MAC) calls within the contract required time frames. There have been at least three emergency calls for service and none of these calls were responded to within the two hour response time required by contract . . . .
>
> . . . .
>
> **Audit Item:** Contract sections B.1.4.21.10, B.1.4.5.3, B.1.5.3.1, and B.1.5.3.1.1 submittals of design plans, equipment to be ordered, joint surveys for placement of equipment for submittals to the VA for approval . . . .
>
> **Technical conclusion:** It has been documented several times by the contracting officer that the contractor has not provided throughout the entire contract the required paperwork for equipment orders, submittals of design for approvals and invoices, packing slips and receipts for return . . . .

Appeal File, Exhibit 153.

telephone service, which could affect patient care by [IPS'] non-compliance with the maintenance requirements of the contract."[13] *Id*.

On January 27, 1999, a meeting was held among Ms. Baughman, Mr. Vollrath, Mr. Hammaker, Mr. Arreola, Mr. Donald Young, Mr. David Young, and Mr. Holst to discuss the state of the contract. Appeal File, Exhibit 111. An unsigned memorandum for the record relates that, during the morning session, the VA staff met with Mr. Arreola to go over the various cure and show cause notices issued, and it was the VA's impression that Mr. Arreola did not want to discuss past performance issues, but wanted to limit the meeting only to currently pending problems. *Id*. After lunch the group was joined by the IPS officials. *Id*. The memorandum recounts the following regarding the afternoon meeting:

> When Mr. Donald Young sat down at the table, he stated that "He was a veteran, and he felt that he had been discriminated against since the beginning of this contract." This statement totally dumbfounded the contracting officer, COTR and Mr. Hammaker. There was no response from the SBA representative to the contractor's statement. The contracting officer asked how or why he felt that way and the contractor did not respond. The contracting officer then started to go over the issues of the supplemental agreements[14] that had been issued in November, but [which the contractor] refused to sign.

Id. Several items were discussed at the meeting, including the VA's concern about the problems with the maintenance and follow on service, particularly IPS' ability to respond to emergencies within the contractually required two hours. Some agreements were reached

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[13] Mr. Hammaker opined that Ms. Baughman "has demonstrated a high level of understanding of the technical elements of the contract, provided concise documentation, and provided the highest standard of monitoring and administration of this contract. I have never worked with a contacting officer that was so meticulous in her documentation and has been involved in day-to-day operational issues as Ms. Baughman. Ms. Baughman has been a pleasure to work with and should be commended for her high standards and attention to detail." Appeal File, Exhibit 153. He also noted that Mr. Vollrath (the COTR and the VADOM's telecommunications manager) had discovered most of the technical discrepancies in the contract, had worked to minimize the impact of the discrepancies, and should be commended for his attention to detail. *Id*.

[14] The contracting officer had proposed two supplemental agreements for decreasing the contact amount in consideration of items and services she believed the VA had not received. As of the date of the meeting, IPS had not yet officially responded to the proposals. Transcript at 323.

that were later captured in a letter from the contracting officer and sent to IPS on February 9, 1999. *Id*., Exhibits 111, 114, 153; Transcript at 323-31, 517, 519.

On January 29, 1999, IPS wrote to the contracting officer as a follow-up to the meeting:

> IPS is concerned with the lack of timely response from our subcontractor [Sprint] . . . . IPS would like to extend a formal apology to the VADOM at this time.
>
> IPS' action to rectify the problem is to have an on-site technician (Pete Cambridge) at the VADOM. Until all matters are settled between IPS and [Sprint], Pete Cambridge is at your disposal to take care of moves, adds and changes, as well as maintenance issues that need to be handled Monday through Friday at the VADOM during regular working hours and after hours. Pete is currently checking in with the VADOM (Dennis Vollrath, COTR) on a daily basis. If for some reason there is a matter that Pete can not troubleshoot . . . then Pete has access to IPS' senior level engineers.

Appeal File, Exhibit 112. IPS went on to assure that "VA projects are serviced as a top priority;" that it had emergency crash kits at various locations; and that it had in place procedures for trouble calls; moves, adds and changes (MACs) [15]; routine calls; and emergency calls. It represented that "IPS has reached an agreement with [Sprint] to provide back-up, follow-on service to the VADOM for IPS," and the agreement would be signed the first week of February 1999. As proof of the agreement, IPS enclosed a letter from its attorney to Sprint's attorneys recounting that IPS and Sprint had been negotiating a subcontract, "that we have reach an agreement in principal, will finalize the subcontract, and [will] execute it during the week of February 1[, 1999]." *Id*.

Ms. Baughman responded on February 2 that IPS was still in a "technical default status" and that the VA had been told by IPS "on numerous occasions" that it had a contract with Sprint; she requested proof by close of business on February 5, 1999, that the subcontract had been signed. Appeal File, Exhibit 112. On February 5, 1999, Mr. David Young wrote to Ms. Baughman that IPS had been informed by Sprint that the agreement it had previously negotiated was "unsuitable and that a new contract needed to be drawn up." *Id*. IPS blamed an unidentified VA employee for interfering in its relationship with Sprint. *Id*. The contracting officer professed that she was unaware that anyone from the VA had

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[15] Also referred to in the record as "follow-on services."

contracted Sprint regarding the subcontract and asked Mr. David Young to provide the name of the individual who contacted Sprint so that the alleged incident could be investigated.[16] *Id*. Mr. David Young reassured the contracting officer that IPS would be providing timely responses:

> We certify that a certified IPS technician or technicians will be available to respond *in person* for all calls from the VADOM, [including] emergency (with 2 hour response time) and non-emergency trouble tickets and/or work orders (with 24 hour response time). The certified IPS technician will respond 24 hours a day 7 days a week, including *weekends.* The certified technicians are Pete Cambridge and Donald Young.
>
> We hope this guarantee will take IPS out of default with the VADOM and place our company in compliance with the contract. We truly wish to give the VADOM the best service our veterans deserve.

Id. Ms. Baughman wrote back on February 9, 1999, that she believed the plan which IPS had outlined and certified met the contract requirements. *Id*.

On February 8, 1999, the contracting officer renewed a request she had made to IPS on January 8, 1999, regarding the telephone system's Y2K compliance.[17] Appeal File, Exhibits 102, 113. Ms. Baughman also attempted to follow-up on several issues discussed at the January 27 meeting by writing IPS on February 9, 1999. *Id*., Exhibit 114. She referenced the two proposed supplemental agreements that had been discussed at the meeting, wrote that they needed to be resolved, and asked IPS to address the items that it was disputing. She noted that as the proposed agreements had been issued over two months ago, she wanted to make a final determination on them. *Id*. In the same letter, Ms. Baughman renewed her request for back-up documentation for the manufacturers' restocking charges

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[16] On June 5, 1999, Mr. David Young wrote Ms. Baughman that IPS believed it was Mr. Hammaker who had contacted Sprint. Since the matter had already been reported by IPS for investigation Ms. Baughman wrote back she would not duplicate the investigation. She asked IPS to keep her advised of any findings. Appeal File, Exhibit 134.

[17] The contracting officer received the required certification from IPS on February 10, 1999. Appeal File, Exhibit 115.

and freight charges that IPS was seeking.[18] As of February 9, 1999, IPS had still not produced the packing slips that it had promised her on January 27. *Id*.

The contracting officer also addressed an ongoing issue that had been a problem since November 10, 1998, the issue of whether two laser printers had been delivered to the VADOM. Appeal File, Exhibit 114. IPS was contractually required to provide two laser printers, but the VA could find only one laser printer and one dot matrix printer at the VADOM. As IPS' invoices charged for two laser printers, the VA sought the back-up documentation to verify it had received two laser printers. Thus far, the VA did not consider the proof IPS had provided as sufficient to establish the VA's receipt of the second laser printer. *Id*., Exhibits 86, 95, 106, 114. Associated with concerns about missing items, the contracting officer informed IPS that the VA had located the missing fifth rack for which she had earlier denied payment. She instructed IPS to re-invoice for the fifth rack. On the outstanding labor charges for which IPS had invoiced, she advised it that as soon as she made a final determination regarding what equipment was actually installed, she would be able to perform a final calculation of the labor charges owed to IPS. *Id*., Exhibit 114.

IPS wrote the contracting officer on February 11, 1999, asking to have Mr. Cambridge temporarily relieved as the on-call technician, and requesting that Mr. John Downey and Mr. Jim Shimamura be substituted. Appeal File, Exhibit 116. The contracting officer responded the next day, denying the request and declaring that only Mr. Cambridge and Mr. Donald Young were certified on the telephone system installed at the VADOM, and that the contract required certified technicians for servicing. *Id*. The contracting officer also noted that as to IPS' assurances to meet specified response times, according to its January 29 letter, IPS had assigned Mr. Cambridge to take care of the VADOM's MAC requirements and maintenance issues that arose during regular working hours and after hours, Monday through Friday, until matters were settled between IPS and Sprint.[19] *Id*.

Ms. Baughman notified IPS on February 18, 1999, that the traffic reports it had submitted on January 28, 1999, did not contain the contractually required information. IPS

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[18] At the January 27, 1999, meeting Ms. Baughman told IPS that her copies of the packing slips, which she needed to verify the charges, were illegible. IPS said it would send the original packing slips to the contracting officer so that she could review the quantities of certain items the VA had received. Appeal File, Exhibit 111.

[19] IPS notified the contracting officer on March 1, 1999, that Mr. Cambridge would be replaced by Mr. Shimamura that week, and that Mr. Shimamura had completed training and was certified to work on the telephone system. Appeal File, Exhibit 120.

was asked to provide complete traffic reports within ten days of the date of the letter.[20] Appeal File, Exhibit 117. On March 16, 1999, the contracting officer issued IPS another cure notice, citing its failure to provide the minimum requirements of the traffic reports as required by paragraphs B.1.2.11 and B.1.2.4.10 through B.1.2.5.2, of the contract. *Id*., Exhibit 123. She gave IPS ten days to cure this deficiency and reminded it that this issue had been raised in two previous letters, on January 20 and February 18, 1999. *Id*.[21] IPS wrote back on April 29, 1999, enclosing a sample of "newly configured reports" for the VA's review. Appeal File, Exhibit 132.

IPS submitted to the contracting officer what it referred to as a "demand letter" on June 4, 1999. Appeal File, Exhibit 133. The letter listed what IPS considered to be the unpaid and partially paid invoices and demanded $674,830.08 in payments; it also contained the certification set forth in Federal Acquisition Regulation (FAR), 48 CFR 33.207. *Id*. Noting that it had recently received payments on certain listed invoices, IPS, on July 8, 1999, submitted to the contracting officer what it called a "demand letter update" seeking $1,169,540.67, for alleged past due invoices and interest. *Id*., Exhibit 136.[22]

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[20] The traffic reports provide important information on call volume (the number of calls traveling through the system) and dial tone call volumes in and out of the facility. The information is necessary for determining whether the system was installed correctly and whether an adequate amount of dial tone service had been ordered for the VADOM. The traffic reports were also essential for the VA to reconcile its monthly telephone charges. Transcript at 526-27.

[21] IPS responded on February 26, 1999, that it was working to make the reports easier to read, and that they would be forwarded to the VA for approval on or before March 4, 1999. Appeal File, Exhibit 123. On March 25, 1999, IPS responded to the March 16 cure notice by providing a letter showing the type of traffic reports it would generate and indicating that Mr. Downey would be providing a copy of the report to the contracting officer by March 26, 1999. *Id*., Exhibit 127. Ms. Baughman received the traffic reports on March 26, 1999. She returned them to IPS on April 19, 1999, maintaining that the reports were not readable and were sent back to IPS under separate cover "to decipher what information these reports show." *Id*., Exhibit 130. She noted that it was her opinion that IPS had not yet cured the traffic reports issue. *Id*.

[22] Ms. Baughman wrote to IPS on July 16, 1999, that she had been in the process of answering the "demand letter" when the "demand letter update" was received. She told IPS that she would respond to the "demand letter update," but that she needed supporting documentation and the claim needed to be certified pursuant to FAR 33.207 since the claimed amount was over $100,000. Appeal File, Exhibit 138. Mr. David Young wrote back

On August 24, 1999, the contracting officer notified IPS that the VA did not intend to exercise the option for maintenance for the next year. She informed IPS that the one-year warranty period on the contract would expire on September 24, 1999, at which time the requirement for its service for the contract would also expire. IPS was given a list of required actions to take to close the contract. Appeal File, Exhibit 142.

The contracting officer wrote IPS on September 22, 1999, with an extensive analysis of each unpaid and partially paid invoice IPS had included in its "demand letter" and its "demand letter update." Appeal File, Exhibit 143. The analysis was comprehensive and very thorough. *Id*. While the contracting officer did acknowledge some monies may be due IPS, for the most part, Ms. Baughman denied payment on the invoices citing a variety of reasons. *Id*. The reasons she gave for denying payment included, in pertinent part, some of the invoices were duplicates, clarification was needed and outstanding issues remained on the payment of the invoices, and some invoices were not for equipment or work performed under the contract. *Id*.

On January 30, 2004, IPS submitted certified claims against contracts V692C-410 and V692P-1926 on unpaid invoices 426498, 426714, 426497, 426297, 426496, 425271, 426493, 426494, and 426495. Appeal File, Exhibit 148. The claims alleged that the VADOM had "breached contract[s] V692C-410 [and] V692P-1926 by wrongfully terminating the contract[s] after the one year warranty period and did not exercise the optional years . . . IPS is seeking adequate adjustment for the hardship [it] incurred as a result of the manner in which [its] contract[s were] terminated." *Id*. IPS alleged it "lost future profits from the ten year contract" including "maintenance profits" and "direct sales profits." *Id*. On March 3, 2004, IPS wrote that it sought $6,777,000 for its breach of contract and lost profits claim, and provided a certification for the claim. *Id*., Exhibit 503.

The contracting officer issued her final decision on January 11, 2005. Appeal File, Exhibit 149. In that final decision Ms. Baughman addressed each invoice that IPS had alleged was unpaid, point-by-point, making her determination of what she believed was the balance due on each invoice. IPS claimed that contract V692C-410 had a balance due of $396,528.55; the contracting officer determined that the amount the VA owed was

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that IPS was not clear on why re-certification of outstanding invoices was necessary. He refused to send another certification unless the contracting officer would "acknowledge that payment will be processed on all outstanding invoices." He also informed the contracting officer that IPS had requested assistance from its Congressman and the SBA on this matter. *Id*.

$130,636.50. The contracting officer decided that of the $4632.63 that IPS claimed was due on contract V692P-1926, the VA owed $1119.50. *Id.* Ms. Baughman did not address the breach of contract and lost profits allegations in her final decision.

The disputes arising out of contested invoices on the telephone system upgrade contract, V692C-410, were timely appealed to the VA Board of Contract Appeals, where they were docketed as follows: VABCA 7348 (disputed invoice 426297), VABCA 7349 (disputed invoice 425271), VABCA 7542 (disputed invoice 426495), VABCA 7543 (disputed invoice 425496), VABCA 7544 (disputed invoice 425497), VABCA 7545 (disputed invoice 425498), and VABCA 7546 (disputed invoice 426714). Appeal File, Exhibit 150. The disputes relating to the site prep contract, V692P-1926, received the following docket numbers: VABCA 7540 (disputed invoice 425493) and VABCA 7541 (disputed invoice 425494). *Id.*

On or about March 9, 2006, IPS alleges it submitted what it referred to as its "bad faith claim" to the contracting officer, seeking $130,066,300 for what it called "expectancy damages."[23] Appeal File, Exhibit 518. On April 4, 2006, IPS submitted to the contracting officer four certified claims. IPS asserted that the VADOM breached the contract when it purchased additional items outside the contract and that IPS "lost profits from direct sales." IPS sought $10,000,100 as the "direct damages to put it in as good a position as it would have been had the VADOM not breached the contract." *Id.*, Exhibit 521. In the second claim, for which it seeks $10,000,100 in damages, IPS asserted the VADOM acted in bad faith in the administration of its contract and thereby breached the contract by failing to pay the balance due on several invoices. *Id.* In the third claim, where it seeks $10,000,100 in "lost future profits," IPS claimed that the contract was a multi-year contract in which the VADOM was obligated to exercise options which would have required it to purchase equipment and maintenance services from IPS for the upgraded telephone system for nine additional years. *Id.* The fourth claim alleged that the VADOM acted in bad faith and breached the contract "by wrongfully terminating the contract after the one year warranty period" and not exercising the options. *Id.* When a final decision was not issued, these disputes were appealed to the VA Board of Contract Appeals, where the four claims were docketed as VABCA 7565 (addressing the alleged bad faith, breach of contract, and failure to exercise the options), VABCA 7566 (lost profits from direct sales), VABCA 7567 (lost future profits), and VABCA 7568 (lost maintenance profits). *Id.*, Exhibit 521. The VA Board consolidated these appeals, as well as the earlier docketed appeals, for purposes of pleading, discovery, processing, and decision.

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[23] The record is unclear as to whether the "claim" was certified and/or whether the contracting officer received it.

On August 2 through 4, 2006, an alternative dispute resolution (ADR) proceeding was held in which all matters related to the disputed invoices (VABCA 7348, 7349, and 7540 through 7546) were resolved. Board Exhibit 2. VABCA 7565 through 7568, relating to IPS' claims for breach of contract, bad faith, racial discrimination, and lost profits, remained unresolved. When the VA Board was consolidated into the Civilian Board of Contract Appeals (CBCA) on January 6, 2007, all of IPS' appeals were assigned CBCA docket numbers.[24] IPS' appeals from its claims for breach of contract, bad faith, racial discrimination, and lost profits, VABCA 7565 through 7568, were redocketed as CBCA 44, 45, 46, and 576, respectively. A hearing in the appeals was held on June 27 and 28, 2007.

IPS' president, Mr. Donald Young, was called to testify at the hearing. Mr. Donald Young has thirty years of telecommunications experience. Transcript at 152. He attested that, as a result of Ms. Baughman's and Mr. Hammaker's treatment of him, he felt he was "being discriminated against." *Id*. at 200. Mr. Donald Young stated that one of IPS' subcontractors' employees even noticed the difference in how he was treated and commented on it. *Id*. at 169-70, 212.

Mr. Donald Young said that his feelings were based on Ms. Baughman's refusal to shake his hand and her demeanor: "You have to experience prejudice to know. If you've never experienced it, it's really hard to explain unless they come out and use racial comments, which she never did. And I never said she did." Transcript at 200-01. He felt Ms. Baughman "looked down on" and "talked down to" him. *Id*. at 167. He also testified about first meeting Ms. Baughman at the September 26, 1997, pre-construction meeting:

> Mr. David Young: When you met [Ms. Baughman], what was her demeanor?
> Mr. Donald Young: It wasn't what I expected. It was . . . just the opposite -- her demeanor and the way I was treated, because over the phone conversation [earlier] it was very pleasant. So, when we met in person, it was like a 180 degree difference.
> Q Okay. Can you explain a little bit more by what you mean?

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[24] The appeals that were resolved via the ADR were redocketed because at the time of consolidation the settlement agreement had yet been finalized and the appeals were still on the VA Board of Contract Appeal's docket. VABCA 7348 was redocketed as CBCA 6, VABCA 7349 as CBCA 36, VABCA 7540 as CBCA 37, VABCA 7541 as CBCA 39, VABCA 7542 as CBCA 39, VABCA 7543 as CBCA 40, VABCA 7544 as CBCA 41, VABCA 7545 as CBCA 42, VABCA 7546 as CBCA 43. Upon finalization of the settlement agreement these appeals were dismissed with prejudice on March 31, 2007.

A Well, first she refused to shake my hand. And that told me something [was] wrong.
Q Why would you feel [something was] wrong?

A Well, we'd been [negotiating] on the contract together for a year -- two years. So at that time, I thought it'd be a ten-year contract. And we'd worked close together so I just figured we'd have a better relationship.

. . . .

Q And you mentioned . . . that [Ms.] Baughman's demeanor was different?
A Yes. It was just like a different personality altogether than what I remembered [from] the phone conversation.
Q And how was the meeting conducted in your opinion?
A Well, it was business. We signed the contract. . . . And there was some other things mentioned there in the meeting.
Q Okay. Like what?
A We were told -- at least I was told -- that I could not use the facilities.

Id. at 155-59.[25] Mr. Young also complained that Ms. Baughman would walk past him without a greeting, was overzealous in her inspections when she personally counted the speakers and horns after they had already been counted by others, and consistently shorted payments on IPS' invoices. *Id*. at 190-202.

According to Mr. Donald Young, even prior to contract award, Mr. Hammaker was rude towards him and he believed that behavior was racially motivated. Transcript at 208-09. He assumed even before the contract began that Mr. Hammaker would be a problem to work with. *Id*. at 210. Also, Mr. Hammaker never shook Mr. Young's hand when he visited the VADOM. *Id*. at 193. During contract performance, Mr. Donald Young felt that Mr. Hammaker treated him differently than others at the facility, in a rude and harassing fashion. *Id*. at 162-67, 231-32. He testified that at one point, during the system cut-over, Mr. Hammaker's harassment got so bad that he told Mr. Hammaker to "leave the switch room because he was interfering with the cut[-over]." *Id*. at 162. Mr. Donald Young remembers that at the January 27, 1999, meeting Mr. Hammaker was very vocal about wanting to default

[25] Mr. Donald Young testified that this was an unsolicited comment from Ms. Baughman and that he interpreted "facilities" to mean bathroom facilities. Transcript at 195-97.

IPS, but that Ms. Baughman "had to correct him saying that it's not up to him [to decide whether or not to terminate for default], it's up to her." *Id*. at 230-31.

Mr. Donald Young acknowledged that Ms. Baughman did not make a racial comment to him. Transcript at 170, 201. However, when he was asked if he believed that racial animus played a role in the administration of the contract, Mr. Young responded:

> A Yes.
> Q Why do you feel that way?
> A Well, for one -- the way I was treated when I arrived . . . at [the VADOM]. And just the ongoing contract, it was -- I never felt or . . . was treated that way on any contract whereas during the whole time of the contract neither [Ms. Baughman nor Mr. Hammaker] would even speak to me in the hallway when we saw each other. And it was just like I was a stranger there.
>
> And . . . we were just harassed . . . continually harassed throughout the contract. So it's the same feeling I got when I grew up in the South . . . when we were told that we could not use the facilities because we were colored, as they were called then. And it was the same feeling.
>
> I hadn't had that feeling in years. But I had the same feeling w[ith] the way I was treated there at White City.
> Q And you were treated by whom?
> A Particularly Mrs Baughman and [Mr.] Hammaker.
> Q What about Mr. Vollrath?
> A Dennis [Vollrath] and I got along -- well, we worked closer together. In fact, I had a desk in his office. So we were together quite a bit.
> Q So you didn't get that feeling from him?
> A No, I didn't.
> Q Did you get that feeling from anybody else at the VA[DOM]?
> A No, I didn't.

Id. at 160-61.

Mr. Young testified that he believed that racial animus formed the basis of some of the cure notices because many of the items cited were completed, and, for him, they evidenced overzealousness and harassment. Transcript at 231-32. "And I just want it on the record that we were discriminated against . . . I was a veteran, and I shouldn't be treated that way . . . there was racial prejudice on site." *Id*. at 252-53.

Ms. Irma Young, IPS' treasurer, was called by IPS to testify about a telephone conversation that she claims to have overheard between Mr. Daniel Portillo, a VA employee

in El Paso, Texas, and Ms. Baughman. Ms. Young claims to have heard a telephone call come to Mr. Portillo from Ms. Baughman, in which she recognized Ms. Baughman's voice through the telephone handset. Ms. Young also says Mr. Portillo identified Ms. Baughman by name. Transcript at 109-112, 125. Ms. Young went on to say that, during that conversation, Ms. Baughman talked about the contractual problems she was having with IPS in White City and attempted to solicit whether Mr. Portillo knew of any problems with a contract IPS had in El Paso. *Id*. at 112. Although IPS listed Mr. Portillo as a witness, it failed to produce him at the hearing to corroborate Ms. Young's testimony. The respondent's attorney was allowed to make an offer of proof about a telephone conversation he had with Mr. Portillo on March 2 or 3, 2007. Mr. Reed, the attorney, recounts that:

> [Mr. Portillo] remembered receiving a telephone call from a woman when Irma Young was sitting in his office . . . he [did not] recall the name of the caller. He did not remember any details about the discussion that he had.
>
> Everything that [Mr. Portillo] knew or understood about this case came from Irma Young, that he knew Mr. [David] Young and Mrs. [Irma] Young and their family.
>
> [Mr. Portillo] said the conversation from what he can remember was very short. He had no contact with the VA about IPS after that call or beforehand, that he did not know who Ms. Baughman was, had never spoken to her before or since. She did not say anything to him that influenced him in any way. She did not make any racial comments that he could remember, but he indicated that he couldn't remember the discussion at all.

Id. at 148-49.

Ms. Young also related some purported conversations she had with Mr. Carlos Chappa, who she said had retired from the VA in Washington, D.C. She testified that Mr. Chappa told her Ms. Baughman "did not like you . . . meaning IPS." Transcript at 137. Mr. Chappa, who was listed by IPS as a witness, was not called to testify about these alleged conversations.

Although he had not heard or thought about the contract in nine years, Mr. Arreola was called as a witness. Mr. Arreola testified he has been "in contracts" and has had contracting officer authority since 1978. Transcript at 31, 37. He began working for the SBA in 1984 as a business development specialist and was the SBA's contracting officer and technical assistance manager for the contract. *Id*. at 37, 66. He left the SBA in 1999 and now works for the Border Environment Cooperation Commission in Juarez, Mexico. *Id*. at

37. During his testimony, Mr. Arreola frequently was unable to remember events or his impressions during the period in issue. *Id*. at 25, 27, 28, 30, 52, 53, 56-58. The January 27, 1999, meeting, was Mr. Arreola's first and only visit to the VADOM contract site. *Id*. at 76. Regarding the January 27 meeting, Mr. Arreola recalled Mr. Hammaker's demeanor as being a "little bitter," and having a "mind-set" or "personal agenda" in favor of defaulting IPS. *Id*. at 23, 48. For him, the January 27 meeting was upsetting and "kind of was over in the first ten minutes for me," because Mr. Hammaker was very outspoken about terminating IPS' contract for default. *Id*. at 22-23. He declared that he did not come to the meeting prepared to discuss termination and believed there was not enough justification for a default. *Id*. He did not remember whether he felt the show cause notices were motivated by racial animus on the part of any of the VA officials. *Id*. at 44-45. He testified, "I think [Mr. Donald Young] did mention that he thought they were picking on him because he was a black firm," but he did not elaborate on when this comment was made. *Id*. at 85-86. He believed that in pursuing the labor issues Ms. Baughman "went a little further than what she should have," certainly further than he would have gone to address the labor issues, but acknowledged that every agency and contracting officer had their own practices. *Id*. at 31-32, 90. When queried about events occurring after the January 27 meeting, Arreola responded, "I don't know . . . I left [SBA] . . . I don't know what happened to that contract . . . and I haven't asked." *Id*. at 48.

Ms. Baughman has been in Government service for over thirty-three years, with twenty-two of them as a contracting officer at the VADOM. As chief of the VADOM's purchasing and contracting office she oversees the section and administers both small and large contracts. She mostly administers construction contracts and, in any given year, handles ten or more contracts at the VADOM. Transcript at 271-74. She asserts that she administered this contract no differently than any other contract she has administered. *Id*. at 405. As a matter of regular practice she asks for payroll records, reviews labor issues, and she testified: "I know that payroll records are required under Davis-Bacon, because I do construction contracts." *Id*. at 310.[26] She "vaguely" remembers the September 26, 1997, pre-construction meeting. *Id*. at 286. When asked if she could possibly have told Mr. Donald Young that he could not use the facilities, she said, "No, I would not have said that at all." *Id*. at 287.

[26] Ms. Baughman provided testimony about how she typically handles wage rate determination issues in the contracts she administered, but noted that she has learned that other contracting officers do not similarly follow her practices. Transcript at 309, 350-53.

> I got to thinking about that last night. Facilities, what does facilities mean? I don't refer to a bathroom as a facility, unless you were to say, "Can I use your restroom facilities[?]"
>
> At our facility we have facilities within our facility. We have a canteen facility there. We have a bowling alley there, facilities for bowling alley.
>
> We have a room where a climbing wall is for the veterans to use. We have a rope course facility at our facility. I don't know if we had it there at that time or not. That was all for patients.
>
> We also have a golf course facility. I don't know if at that time the golf course was open to the public. At one time it was just for veterans that stayed at our facility. So, to me, which facilities is he referring to[?] I don't refer to a bathroom as a facility [or] facilities.

Id. at 373-74. Ms. Baughman acknowledged that, depending on what facilities a contractor was asking to use, it would be possible that she would tell a veteran contractor he could not use some of the VADOM's facilities. However, she explained: "I would not tell anybody they could not use a public restroom. I'm not going to allow a contractor to go into a veteran's bedroom and use his bathroom when there are gang toilets in different buildings. There are also public restrooms around that anybody can use. I would not deny anybody to use a bathroom, other than in a veteran's area directly." *Id*. at 374-75. She attested that normally, in a pre-construction meeting, the VA would address the COTR delegation, parking, and storage. In addition, "we tell them which . . . bathrooms they can use, because you can't just walk into a veteran's bedroom and use their bathroom, so we do have some public . . . restrooms . . . at the facility, and the contractors are usually told which ones . . . they're allowed to use." *Id*. at 332. Ms. Baughman does not recall shaking anyone's hand at the pre-construction meeting. *Id*. at 372-73.

When asked about the reason she called the January 27, 1999, meeting, Ms. Baughman recalls, "We had so many issues that we could not get resolved that I felt it was time that SBA stepped in and tried to help us with this contractor to straighten out the different problems we were having." Transcript at 321. Regarding whether she wanted to default the contractor when she went into the January 27 meeting, she testified:

> I don't believe that we did [want to terminate the contractor]. I mean, we were so far into the contract at that time with issues that had come up during the contract, the contractor's lack of submitting paperwork on time, their timely submission of the requirements within the contract, and the gentleman from

> SBA, Mr. Arreola, because of the cure notices that we had issued prior to that time, he felt that . . . those were issues in the past and did not want to really dwell . . . on those [issues].

Id. at 324. She recounted:

> As soon as Mr. Donald Young sat down at the table, he said that he felt that he had been discriminated [] against, that he was a veteran-owned small business, and I was totally dumbfounded. I really was . . . I asked him what he meant by that, and he never did respond.

Id. at 326-27.

About the contract, Ms. Baughman had the impression that IPS kept changing the personnel around, and the VA had to regularly put the company "on notice they were not doing something." Transcript at 291-95. When asked about her decision not to exercise the option she declared: "With all the issues that we went through on the contract, their delay in . . . getting information to us, documentation that had been asked for, the issue with regards to response time. There [were] a number of issues throughout the contract." *Id*. at 307. She also relied on the COTR, who had informed her that he did not wish to continue with a contract that had the documentation and coordination problems they had experienced with IPS. *Id*. at 378, 387-88. Ms. Baughman believes that she had grounds to terminate the contractor for default, but elected not to do so. *Id*. at 307.

In his testimony at hearing, the COTR, Mr. Vollrath, verified that being frustrated with the contractor and not being able to get things done, he recommended to Ms. Baughman that she not exercise the option on IPS' contract. Transcript at 455. When asked whether he had ever seen the contracting officer discriminate based on race, Mr. Vollrath testified: "I've known Kathy for 20 years and never saw that in her ever." *Id*. at 480.

Positions of the Parties

The appellant avers that it has been a victim of a series of bad faith acts on the part of certain VA contracting officials during the administration of the contract. As set forth in its claims and subsequent complaint, the appellant avers that "racial prejudice" was the basis of the bad faith acts, and that the bad faith racial discrimination can be seen in specific incidents. The appellant argues that the withholding of payments, overzealous inspections, and disparaging remarks made by certain VA officials involved in administering the contract are also evidence of bad faith and racial discrimination. The appellant asserts that the contracting officer went on a "nationwide campaign" and contacted other VA facilities to

disparage IPS and ruin its good name, force it out of business, sabotage the contract, and destroy its relationship with its subcontractor, Sprint. The appellant also posits that the contract was a "multi-year" contract and that because of her bad faith and racial animus against the appellant the contracting officer did not exercise the option years for the direct sales of equipment and telephone system maintenance set forth in the contract.

The respondent argues that this was not a "multi-year" contract, but rather, a contract with base period requirements and nine option years, which if exercised by the VA, would provide for equipment purchase and maintenance of the upgraded telephone system. The respondent avers that while the appellant has made general statements about being treated unfairly, it has failed to show a single act that suggests racially-motivated or bad faith behavior on the part of a VA contracting official. The respondent asserts that a review of the record reveals a host of performance issues and an "almost cavalier attitude by the contractor regarding any acceptance of responsibility for its own performance deficiencies," which provided a reasonable basis for the contracting officer's decision not to exercise the option for the first option year.

Discussion

At the outset of this discussion we note that the gravamen of the appellant's claims and subsequent appeals is the alleged bad faith evidenced by the contracting officials at the VADOM while administering the contract and deciding not to exercise the option for the first option period in the contract.

The appellant's position that the contract was a "multi-year contract" is without merit. The appellant's "hopes" or "intentions" that it would have a ten-year relationship under the contract do not make this a multi-year contract. The contract contained a standard option clause common to federal contracts that articulates the nature of the Government's broad discretion in exercising options. The SF 1449 executed by the parties provides for an "award amount of $3,441,273.90, (IF GOVERNMENT EXERCISES ALL OPTIONAL MAINTENANCE YEARS)." Clearly, the contract referred to a base requirements period in which the equipment needed to upgrade the VADOM's telephone system was to be provided, installed, tested, accepted, and then warrantied for one year after acceptance. The contract also referred to nine option periods, which the VA had the option of exercising. If an option was exercised, the contractor was obligated to provide extra equipment and maintain the telephone system for the period of the option at the already agreed upon prices set forth in schedules contained in the contract. There is no compelling evidence to support an argument that this was a multi-year contract. It is well established that "the language of a contract must be given that meaning that would be derived from the contract by a reasonable [sic] intelligent person acquainted with the contemporaneous circumstances."

Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 975 (Ct. Cl. 1965). When the contract language is unambiguous, a court's inquiry ends, and the plain contract language controls. *Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998).

Under the standard option clause language contained in this contract, the VA, at its discretion, had a broad, unilateral right either to exercise the option for the first option period or not to exercise it. The United States Court of Appeals for the Federal Circuit has explained that the language of this clause is clear and unambiguous and that nothing in this language restricts the Government's bargained-for right to decline to exercise its option to extend the term of the contract. *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988); *accord Dynamics Corp. of America v. United States*, 389 F.2d 424, 431 (Ct. C1. 1968). It has been consistently recognized that option contracts generally bind only the option giver and not the option holder; that the option clause does not impose on the Government a legal obligation to exercise the option; and that the contractor has no right to the option work unless and until the Government exercises the option. *See Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581 (*citing Green Management Corp. v. United States*, 42 Fed. C1. 411, 434 (1998); *Continental Collection & Disposal, Inc. v. United States,* 29 Fed. C1. 644, 650 (1993); *MManTec, Inc. v. General Services Administration*, 99-1 BCA ¶ 30,122, at 149,022 (1998); *Plum Run, Inc.*, ASBCA 46091, et al., 97-2 BCA ¶ 29,193, at 145,231; *United Management Inc. v. Department of the Treasury*, GSBCA 13452-TD, 96-2 BCA ¶ 28,312, at 141,362-63; *Pennyrile Plumbing, Inc.*, ASBCA 44555, et al., 96-1 BCA ¶ 28,044, at 140,029; *Vehicle Maintenance Services v. General Services Administration*, GSBCA 11663, 94-2 BCA ¶ 26,893, at 133,879-80; *Centennial Leasing v. General Services Administration*, GSBCA 11409, 93-2 BCA ¶ 25,609, at 127,474-75; *Gricoski Detective Agency*, GSBCA 8901(7823), et al., 90-3 BCA ¶ 23,131, at 116,145); *see also TMI Management Systems, Inc. v. United States*, 78 Fed. Cl. 445 (2007).

As the Board recently articulated in *Blackstone Consulting, Inc. v. General Services Administration*, however, "A tribunal may award damages for unexercised option years of a contract if a contractor proves that the decision not to exercise an option was a product of bad faith or so arbitrary and capricious as to be an abuse of discretion." CBCA 718, 08-1 BCA ¶ 33,770, at 167,159 (*citing Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514; *Nova Express*, PSBCA 5102, 08-1 BCA ¶ 33,762; *IMS-Engineers-Architects, PC*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,674). While the appellant here points to events as evidence of certain VADOM officials' bad faith, it has failed to provide any compelling proof that the contracting officer or any other VA official acted in bad faith, arbitrarily, capriciously, or, more specifically, with racial animus towards IPS' officers or employees during the administration of this contract.

Turning to the allegations of bad faith, as a general principle, we presume that government officials act in good faith in the discharge of their duties. Overcoming that presumption presents IPS with a high hurdle. We recently stated in Greenlee, 07-1 BCA at 166,063, "a contractor who asserts that a government official was motivated by bad faith in the conduct of his duties bears the burden of proving its assertion by clear and convincing evidence -- 'evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is *highly probable*.'" *See also Am-Pro Protective Agency, Inc. v United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685.

To recover for bad faith action by government officials under a contract, a contractor must provide a direct connection between the alleged bad faith action and an express or implied contractual obligation or contract term. If a bad faith, tortious, or discriminatory action on the part of a government official is merely "related" in some general sense to a "contractual relationship" between the parties, as opposed to a "particular contract," we lack the jurisdiction to review those bad faith acts. To the extent appellant seeks remedies that are not provided by the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, and its implementing regulations, the appellant must initiate separate proceedings in the appropriate tribunals. *See Dan Parish v. General Services Administration*, GSBCA 16025, 03-1 BCA ¶ 32,211, at 159,304. Even if the events raised by the appellant actually occurred, we have a problem seeing how some of the specific incidents alleged here, regarding the non-shaking of hands, lack of warmth, rudeness, or refused use of facilities, could seriously have impacted or hindered IPS' performance of the contract. IPS has failed to tie most of the alleged occurrences to the performance of the contract.

The appellant also alleges that the contracting officer was overzealous in her inspections and administration of the contract. Good contract administration depends upon the development of mutual confidence and respect between government and contractor officials, and both parties have a duty to cooperate and act in good faith during contract administration. However, we cannot fault the contracting officer for her dogged persistence, that, notwithstanding the contractor's performance problems, she was going to administer the contract the way she did with other contractors, obtaining the goods and services the contract specified. Where IPS alleges that delays and shortages in the payment of several of its invoices show the contracting officer's bad faith and breach of contract, we disagree. Ms. Baughman had genuine concerns about the invoices, did meticulous research, drafted cogent correspondence, and raised articulate questions, many of which resulted in adjustments in the original amounts IPS sought. More specifically, she found duplications in invoices and other deficiencies that ultimately affected the amounts due. We found Ms. Baughman to be very forthright and credible in her testimony. The record shows that there were legitimate

differences between the parties regarding performance and payments. Such differences do not amount to bad faith. The Board cannot conclude that a contracting officer acted in bad faith, simply because there was a difference of opinion regarding an invoice or a proposed modification. So long as a genuine, reasonable difference exists between the parties, we cannot say that one party or the other is acting in bad faith.

The appellant has failed to meet its burden of proving that the VADOM officials acted in bad faith while administering the contract or by not exercising the options. The appellant's witnesses' testimony as to the alleged bad faith and racial animus of the VA contracting officer and technical advisor was not credible or reliable. Many of the supposed incidents were uncorroborated and no documentary evidence was introduced to support them. The conclusions the appellant drew from the supposed incidents were not reasonable. To the contrary, we find the actions of the contracting officer and technical advisor to have been reasonable, good faith actions, given the circumstances they encountered during the pendency of the contract.

Of note, the appellant's allegations of bad faith and racial animus were late in being raised with the VA, and left the VA at a disadvantage as how to respond. The word "discrimination" was voiced by the appellant's president during a heated meeting with VA officials, but what the precise bad faith acts showing racial animus were was not elaborated upon at that meeting, even though specifics were requested. "Racial discrimination" was raised in the appellant's complaint, but by only using the most general of averments about alleged overzealousness of the contracting officer and interference by a technical advisor. It was not until a telephone conference with the presiding judge and discovery that the appellant finally identified "specifics" about supposed actions that it contended established bad faith and racial animus on the part of the VA. By the time the appellant revealed that it was relying on the contracting officer's and technical advisor's supposed refusal to shake Mr. Donald Young's hand at a meeting, and lack of warmth towards Mr. Young during the contract, approximately eight years had passed since these alleged incidents.

Neither the SBA representative nor any other VA participants remembered much at all about the September 26, 1997, pre-construction meeting or the supposed occurrences that Mr. Donald Young raised. So, too, the VA was at a loss to comment on the contracting officer's supposed statement that the Mr. Donald Young could not use the facilities. While we do not doubt that Mr. Donald Young believes he and his company were discriminated against and are victims of the VA's bad faith, there are ample other possible explanations for these occurrences. Perhaps, too, more timely raising of any misimpressions regarding racial animus might have facilitated smoother contract performance. In any event, IPS has failed to meet its burden of providing clear and convincing evidence of bad faith by the Government.

What we found very striking also was the appellant's apparent obliviousness as to its own role in how this contract was administered and why the option was not exercised. The facts presented show ample evidence of IPS' lackluster, if not deficient, performance. It is clear that, throughout the pendency of the contract, IPS had difficulty submitting proper contract documentation and meeting response times. Furthermore, Mr. David Young and Ms. Baughman were engaged in a "war" of letter writing, from which IPS certainly did not emerge the victor. Essentially, the VADOM got tired of IPS' lack of responsiveness and did not want to extend the experience by exercising the option. Given the circumstances here, we refuse to second guess or find an abuse of discretion in the contracting officer's decision not to exercise the contract option.

The appellant has mentioned throughout the contract and in testimony that it is an 8(a), veteran-owned, minority business. The Board does not accord special treatment in determining whether the burden of proof has been met because of a contractor's status as a small business. *U.S. Detention*, DOT CAB 2908, 99-1 BCA ¶ 30,305; *HLI Lordship Industries, Inc.*, VABCA 1785, 86-3 BCA ¶ 19,182. There is no basis in law, regulation, or contract for the proposition that we are required to judge the Government's actions toward a small business by a higher standard or to subject its conduct to special scrutiny. *Huff & Huff Service Corp.*, ASBCA 36039, 91-1 BCA ¶ 23,584 (1990); *Torres Construction Co.*, ASBCA 25697, 84-2 BCA ¶ 17,397. Conversely, a contractor cannot assume that it can meet a lower standard of performance simply by reason of its small business, veteran, or minority status.

Decision

Accordingly, these appeals are hereby DENIED.

_____
PATRICIA J. SHERIDAN
BOARD JUDGE

We concur:

_____
ANTHONY S. BORWICK
Board Judge

_____
RICHARD C. WALTERS
Board Judge